

MOHAMMED (Migration) [2021] AATA 1730 (27 May 2021)

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Sultan Khan MOHAMMED

CASE NUMBER: 1935729

HOME AFFAIRS REFERENCE(S): BCC2019/4282440

MEMBER: Stephen Witts

DATE: 27 May 2021

PLACE OF DECISION: Melbourne

4.

DECISION: The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Statement made on 27 May 2021 at 12:58pm

CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – bogus document and false or misleading information in visa application – certificate of attainment from university in home country – verification check found certificate to be non-genuine – claim to have studied at affiliated college not supported by documentary evidence – no compassionate or compelling circumstances justifying grant of visa – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5(1), 65

Migration Regulations 1994 (Cth), Schedule 2, cl 500.217, Schedule 4, criterion 4020(1), (3), (5)

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 11 December 2019 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
6. The applicant applied for the visa on 28 August 2019. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 500.217 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the delegate made a finding that the applicant had provided false or misleading information in accordance with the requirements of PIC 4020.
7. The applicant appeared before the Tribunal on 27 May 2021 to give evidence and present arguments.
8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 500.217 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
10. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

11. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
12. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
13. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
14. According to the delegate's decision record dated 11 December 2019 provided to the Tribunal by the applicant, the applicant provided a bogus document or information that is false and misleading in a material particular in relation to the application for the visa. The delegate noted that it is a requirement of clause 500.217 that the applicant satisfies public interest criterion 4020 in Schedule 4 of the Migration Regulations 1994.
15. In particular the delegate noted that on 28 August 2019 the applicant provided evidence to the department that was considered to be of a nongenuine nature. According to the delegate in his application the applicant included a certificate of attainment from Anna University. According to the delegate in October 2019 it contacted this university to conduct a verification check on the certificate of attainment and that the University confirmed that had it had not been issued from their college. According to the delegate the applicant was provided with 28 days to provide comment on the suspected nongenuine information supplied to department but did not do so. The delegate made a finding that the applicant had provided such information and that he had not provided any evidence seeking a waiver of PIC 4020.
16. At the hearing the Tribunal had a discussion with the applicant regarding the decision of the Department regarding the provision of alleged nongenuine information, and the provision of an alleged bogus document. The applicant stated that he did not study at Anna University but did study at an affiliated college. The Tribunal noted that the applicant has not provided any evidence of any qualifications for the Tribunal to consider. The applicant stated that he did study a bachelor level course in civil engineering at this affiliated college. The Tribunal had a detailed discussion with the applicant regarding these matters and notes that the applicant has acknowledged that he did not study at or achieve a qualification at Anna University back in his home country. The applicant stated that he did study at an affiliated college which the Tribunal has considered carefully but after a lengthy conversation with the applicant about this matter was concerned that the applicant was not providing evidence in this regard that was plausible or credible or supported by any documented evidence.
17. The Tribunal has considered this matter carefully and finds that there is evidence before the Tribunal that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a medical officer of the Commonwealth a bogus

document as defined in s 5(1), i.e. a document that the Tribunal reasonably suspects is a document that is counterfeit or has been altered by a person who does not have the authority to do so and is information that is false or misleading in a material particular as defined in PIC 4020(5) i.e. information that is false and misleading at the time it is given in relation to the visa application.

18. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

19. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
20. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
21. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
22. At hearing the Tribunal had a discussion with the applicant as to whether he would like to put such evidence to the Tribunal.
23. The applicant stated that he is working as a warehouse person for a food processing company here in Australia and that his employer would be affected if he did not continue to work there. The Tribunal has considered this evidence carefully and finds that the applicant's statement that he is currently working here in a business in Australia and that that would justify the grant of the visa is not sufficient evidence in itself of compelling circumstances that affect the interest of Australia or compelling or compassionate circumstances that affect the interest of an Australian citizen or permanent resident.
24. The Tribunal notes that warehouse storage work is not a skilled field that would be difficult to fill or that in fact would cause that employer here in Australia any difficulties in replacing such staff. The Tribunal had a discussion with the applicant about this and found the applicant's evidence in this regard to be not credible. The Tribunal finds that the applicant has thought of this at the last moment and presented it to the Tribunal in lieu of any other compelling factors. As stated, the Tribunal does not accept his evidence as plausible or credible after due consideration.
25. The Tribunal has considered this matter carefully and finds that the applicant has not put forward any evidence that there are compelling circumstances that affect the interest of Australia, or compassionate or compelling circumstances that affect the interest of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen that justify the grant of the visa.
26. Therefore, the requirements of PIC 4020(1) or (2) should not be waived.
27. Concluding paragraphs

28. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 500.217.
29. The Tribunal also finds that the applicant does not meet the criteria for any other subclass within the class of visa sought.

DECISION

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31. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Stephen Witts
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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